

FINAL AWARD DENYING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge
by Supplemental Opinion)

Injury No.: 05-031550

Employee: Anto Anic

Employer: Bussen Realty & Terminal Co. (Settled)

Insurer: AIG Domestic Claims Inc. (Settled)

Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence, read the briefs, and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated July 9, 2010, as supplemented herein.

Introduction

The only issue at the hearing was the liability, if any, of the Second Injury Fund.

The administrative law judge made the following findings: (1) employee suffers from no more than 10% permanent partial disability of the body as a whole related to any depressive disorder; (2) employee suffers no permanent partial disability related to any difficulty with the English language; (3) employee sustained a compensable injury on April 8, 2005, which resulted in 10% permanent partial disability referable to the hand with no aggravation of a psychiatric condition; (4) employee suffered a preexisting left foot injury which resulted in 30% permanent partial disability at the 155-week level; and (5) the Second Injury Fund is not liable for benefits because employee's preexisting hand injury does not meet the statutory threshold.

Employee filed an Application for Review alleging the administrative law judge erred because: (1) the award is contrary to the opinions of employee's experts; (2) the administrative law judge ignored the opinion of Mr. Dolan; and (3) the administrative law judge substituted his own opinions for those of Dr. Rosen.

The Commission affirms the award of the administrative law judge as supplemented herein.

Discussion

Credibility of the experts

Although we agree with the result reached by the administrative law judge in this matter, the reasoning set forth in the award is somewhat unclear and raises the question whether the administrative law judge substituted his own opinions for those of the medical and vocational experts. We are also concerned that certain comments and

Employee: Anto Anic

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findings in the award suggest the administrative law judge applied nonexistent legal principles, such as the following, which seems to conflate a standard of proof with a standard of judicial review:

Evidence in support of the conclusions should be clear and convincing in order to meet the standard of competent and substantial.

Award, page 9.

This case does not turn on any such esoteric principle of law but rather on a question of whether the evidence presented is persuasive on the sole issue. The question, stated simply, is whether the opinions of employee's experts are credible on the issue of Second Injury Fund liability.

We have carefully weighed the opinions of each of the vocational and medical experts, and we write this supplemental opinion in order to make clear and explicit credibility findings.

Permanent partial disability

The sole issue is the liability, if any, of the Second Injury Fund for permanent partial disability enhancement as a result of the combination of the April 8, 2005, primary injury with any preexisting permanent partial disability. Section 287.220.1 RSMo provides for permanent partial disability benefits to be paid from the Second Injury Fund when an employee who suffers from preexisting permanent partial disability that constitutes a hindrance or obstacle to employment sustains a later injury that also results in permanent partial disability, so long as both the preexisting and the primary permanent partial disability meet the thresholds of 12.5% for a body as a whole injury or 15% for a major extremity injury.

The Commission may consider all the evidence, including the testimony of the employee, and draw all reasonable inferences in arriving at the percentage of disability. This is a determination within the special province of the Commission. The Commission is also not bound by the percentage estimates of the medical experts and is free to find a disability rating higher or lower than that expressed in medical testimony. This is due to the fact that determination of the degree of disability is not solely a medical question. The nature and permanence of the injury is a medical question, however, the impact of that injury upon the employee's ability to work involves considerations which are not exclusively medical in nature.

Elliott v. Kan. City School Dist., 71 S.W.3d 652, 657 (Mo. App. 2002) (citations omitted).

Dr. Berkin opined that the injury to employee's right finger is a hindrance and obstacle to employment and that it's impossible for employee to do a sit-down job using his hands for any extended period of time. Dr. Berkin opined that employee should be restricted from forceful gripping, squeezing, pinching, twisting, pulling, or reaching with his right hand, and should avoid high-impact tools. Dr. Berkin opined that employee

Employee: Anto Anic

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sustained a permanent partial disability of 12.5% of the right wrist as a result of the primary injury.

After carefully weighing all of the evidence, we agree with the administrative law judge that the primary injury caused employee to sustain a 10% permanent partial disability of the hand at the 175-week level, and that employee is not entitled to permanent partial disability benefits from the Second Injury Fund in this matter because the primary injury does not meet the statutory thresholds.

Decision

We supplement the award of the administrative law judge with the foregoing findings and comments. In all other respects, we affirm the award.

The award and decision of Administrative Law Judge John A. Tackes, issued July 9, 2010, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

Given at Jefferson City, State of Missouri, this 31st day of May 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

FINAL AWARD

5/31/2011 8:01 AM

Employee:	Anto Anic	Injury No.:	05-031550
Dependents:	N/A	Before the	
Employer:	Bussen Realty & Terminal Co. (Settled)	Division of Workers'	
Additional Party:	Second Injury Fund	Compensation	
Insurer:	AIG Domestic Claims Inc. (Settled)	Department of Labor and Industrial	
Hearing Date:	April 5, 2010	Relations of Missouri	
		Jefferson City, Missouri	
		Checked by:	JAT

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: April 8, 2005
5. State location where accident occurred or occupational disease was contracted: Saint Louis City
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Claimant hit his right hand with a hammer.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Right hand and index finger.
14. Nature and extent of any permanent disability: 10% PPD (right hand)
15. Compensation paid to-date for temporary disability: \$0.00
16. Value necessary medical aid paid to date by employer/insurer? \$0.00

Employee: Anto Anic

Injury No.: 05-031550

- 17. Value necessary medical aid not furnished by employer/insurer? \$0.00
- 18. Employee's average weekly wages: N/A
- 19. Weekly compensation rate: \$433.48 (TTD / PTD); \$354.05 (PPD)
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

- 21. Amount of compensation payable: None
- 22. Second Injury Fund liability: None
- TOTAL: \$0.00
- 23. Future requirements awarded: N/A

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Ray B. Marglous

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Anto Anic

Injury No: 05-031550

Dependents: N/A

Employer: Bussen Realty & Terminal Co. (Settled)

Additional Party: Second Injury Fund

Insurer: AIG Domestic Claims Inc. (Settled)

Hearing Date: April 5, 2010

Before the
**Division of Workers'
Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Checked by: JAT

INTRODUCTION

A hearing in this Matter was held on April 5, 2010, in St. Louis, Missouri at the Division of Workers' Compensation before Administrative Law Judge John A. Tackes. Anto Anic, Claimant, appeared in person and testified. Robert Merlin represented Claimant. Kareitha Osborne represented the Second Injury Fund. J. Stephen Dolan, Certified Rehabilitation Counselor was present and testified on behalf of Claimant.

Prior to the hearing claims for two injury numbers (05-031550 & 05-098958) were settled against the Employer/Insurer by compromise lump sum settlement. The Second Injury Fund was not a party to either of those settlement agreements. The employment relationship, insurance coverage under Workers' Compensation, notice, and timeliness of the claim are not at issue in this award.

All objections not expressly ruled upon in this award are overruled to the extent they conflict with this award.

STIPULATIONS

1. The date of injury for injury number 05-031550 is April 8, 2005.
2. Temporary Total Disability (TTD)/Permanent Total Disability (PTD) and Permanent Partial Disability (PPD) compensation rates for each both injury numbers is \$433.48/\$354.05.

ISSUES

The sole issue is the liability of the Second Injury Fund for benefits.

FINDINGS OF FACT

Based on the competent and substantial evidence and my observations of Claimant at trial, I find:

1. Claimant is a Yugoslavian born Croat. He was born December 7, 1953 in what is now Bosnia. He attended a vocational high school to become a machine operator and machinist. As an ethnic minority, Claimant experienced discrimination and limitation of career and educational opportunity because of his religious and political views. While in Bosnia he was diagnosed with throat cancer. Claimant had some cancer treatment in Bosnia but his treatment was interrupted when war broke out.
2. In Bosnia, Claimant was employed as a miner for ten years where he received additional on the job training and drove diesel trucks. Claimant served 15 months in the army in a non combat role where he received additional machine and weapons training. His underground work at the mines affected his breathing and he was moved to a position above ground. Claimant continues to complain of breathing trouble when working with chemicals. Claimant left Bosnia in 1994 after the war and moved to Germany. In Germany he completed his cancer treatment before coming to the United States.
3. Claimant is literate in both Bosnian and Croatian. He is able to speak some German but spoke no English before he came to the United States. Since arriving in the United States, Claimant has learned a considerable amount of English. He testified at hearing without the assistance of a translator. He was evaluated by physicians and vocational experts without the use of translators. He has held several jobs in America.
4. Claimant was employed at Bussen Terminal (Bussen) from August 11, 1999 to November 2005 as a forklift operator. This position required lifting, bending, squatting, climbing and reaching. He also maintained and cleaned machinery. Prior to this he held a sedentary position for about two months inspecting vending machines. Prior to this he worked at a church as a maintenance man for a year where he cleaned, painted, and emptied trash.
5. Claimant had no injuries at either of his first two jobs after arriving in St. Louis. The work he performed as a maintenance man was physical in nature but he was able to complete all duties as assigned. The more physical position was with Bussen where he loaded and unloaded barges on the Mississippi River. This work involved lifting, walking, standing, and some climbing.
6. On February 18, 2000, Claimant injured his left foot while on a barge cutting bundles of material. A heavy piece of equipment fell on his foot causing laceration and fractures of all five toes. He had several surgeries and physical therapy. He returned to work with restrictions on climbing, standing, pushing and pulling. In November, 2000 Dr. Sudekum released Claimant to return to full duty. Dr. Sudekum opined 8% PPD of the left foot at the ankle.
7. Claimant continued to complain of pain in his left foot with weight bearing and had a residual limp. He was seen by Dr. Place in January 2001. Dr. J.H. Morrow, saw Claimant in July, 2002 because of continued complaints and loss of range of motion. He rated 60% PPD of the left lower extremity at the ankle. Claimant continues to complain

of pain in his left foot and has a limp. The injury to his foot made it more difficult for him to bend, lift, and stoop.

8. On April 8, 2005, Claimant injured his right hand when he struck it with a hammer working for Bussen. He was treated for a contusion and abrasions to his fingers. An x-ray showed a healing stress fracture of the right second finger. He had physical therapy in May, 2005. On May 31, 2005, Dr. Brown released him to return to work without restrictions. He received medical treatment for a fracture and the tip of his index finger remains crooked and unable to straighten completely. He complains of pain in the finger and difficulty grabbing and holding items with that hand.
9. Claimant was seen by Dr. Shankar Rao, a psychiatrist with Psych Care Consultants, beginning in November, 2005. He was examined and treated from November 11, 2005 to January 26, 2006. Dr. Rao diagnosed Claimant with PTSD and depression and prescribed medication. According to his psychosocial evaluation of November 11, 2005, the onset or duration of the illness was three years prior. Claimant is no longer under the care of Dr. Rao.
10. John Stephen Dolan, a vocational rehabilitation counselor, gave expert testimony at hearing with regard to Claimant's employability in the open labor market. Mr. Dolan evaluated Claimant in person on August 6, 2009, at the Claimant's request to determine whether Claimant's disability interferes with his employment or re-employment and to assess whether Claimant could return to work with the assistance of education, training, and job placement.
11. Mr. Dolan met with Claimant once in person and spoke with him a second time by telephone. His evaluation was based on a review of medical records, expert reports, and vocational exams given during the examination. Claimant was tested for his math and reading skills. Claimant tested higher for math skills than reading. Mr. Dolan did not consider Claimant a candidate for retraining. Mr. Dolan concluded Claimant was unemployable due to education, physical limitations, psychiatric condition, and English proficiency.
12. Mr. Dolan's opinion that Claimant is not employable is based on a review of Claimant's work history, training, and education from a review of available records and his examination of Claimant. He was aware that Claimant spoke no English when he arrived in America but after twelve years was able to meet with him and communicate in English without the assistance of a translator. Mr. Dolan does not anticipate Claimant's language skills improving which played a role in his ultimate opinion regarding employability. In his testimony at hearing, Mr. Dolan opined that were it not for the language barrier, Claimant would be able to compete for at least some entry level unskilled positions.
13. Claimant was administered a Global Assessment of Functioning (GAF) which is used to determine employability and educational ability. He scored just below the level of employability on the test. No employment records from Bussen were reviewed by Mr. Dolan. The second time he met with Claimant was by telephone on March 22, 2009. The conversation was completed without an interpreter.

14. Dr. Wayne Stillings, Kare & Therapy, Inc., saw Claimant on November 16, 2006, for a psychiatric IME. Dr. Stillings diagnosed PTSD related to Claimant's experience in the Bosnian war, mood disorder due to the injury to his right shoulder and index finger, chronic pain, chronic emotional problems from the Bosnian war, and found Claimant achieved psychiatric MMI effective November 16, 2006.
15. Dr. Stillings opined psychiatric PPD as 25% BAW for mood disorder from April, July, and October 2005 injuries and 25% PPD BAW for pre-existing chronic PTSD. The PPD values assigned by Dr. Stillings are not credible and given no weight in this award.
16. Dr. Shawn Berkin performed an IME on December 11, 2006. Based on Claimant's complaints of pain in his right index finger and right shoulder, limited range of motion in his right arm, and weakness in his right arm and hand, as well as the rotator cuff strain with impingement syndrome, he rated Claimant's PPD as follows:
 - 12.5% right upper extremity at the wrist.
 - 10% right upper extremity at the shoulder (July 1, 2005)¹
 - 35% right upper extremity at the shoulder (October 3, 2005)
 - 40% left lower extremity at the ankle (Pre-existing).
17. James M. England, Jr., Rehabilitation Counselor saw Claimant twice at Claimant's request for the purpose of an evaluation of Claimant's employability in the labor market. He saw him February 22, 2007 and again in December, 2007. Mr. England opines that Claimant is not capable of competing for and sustaining regular employment on the open labor market because of a combination of the psychological problems and the physical issues. He found Claimant's physical limitations, English proficiency, and depression combined prevented employment.
18. Dean L. Rosen, Psy.D., Clinical Psychologist examined Claimant on August 8, 2008. He reviewed Claimant's medical records, examined and interviewed Claimant for a report on Claimant's employability. Included in the records reviewed by Dr. Rosen were the diagnoses of depression/PTSD by Dr. Rao as well as Mr. England's vocational assessment. In tests administered by Dr. Rosen, Claimant scored low on vocabulary and abstract problem solving. He opined that Claimant's age, psychiatric diagnoses, physical limitations and lack of fluency in English prevented sustained employment, and rated him 25% PPD referable to the man.
19. Claimant complained of problems he experienced with coworkers at different jobs. At one position he was working with Bosnians where Claimant was the only Croat. Claimant explained that in Bosnia, the Bosnians and Croats were enemies which made working with them difficult. At another position he found American workers' curiosity about his past and his ethnicity annoying. Claimant continues to complain of pain in his left foot, right hand, and right arm. If he sits or stands for long periods of time his left foot becomes numb.

RULINGS OF LAW

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented and the applicable law, I find the following:

A claimant in a worker's compensation proceeding has the burden of proving all elements of his claim to a reasonable probability. *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 911 (Mo.App. 2008). In order for a claimant to recover against the Second Injury Fund for PTD or PPD, he must prove that a pre-existing disability combined with a disability from a subsequent injury in one of two ways: (1) the two disabilities combined result in a greater overall disability than that which would have resulted from the new injury alone and of itself; or (2) the pre-existing disability combined with the disability from the subsequent injury to create permanent total disability. *Reese v. Gary & Roger Link, Inc.*, 5 S.W.3d 522, 526 (Mo.App. 1999), citing *Searcy v. McDonnell Douglas Aircraft Co.*, 894 S.W.2d 173, 177-178 (Mo.App. 1995); *Uhlir v. Farmer*, 94 S.W.3d 441, 444 (Mo.App. 2003).

Claimant must also prove that he had a pre-existing permanent partial disability, whether from a compensable injury or otherwise, that: (1) existed at the time the last injury was sustained; (2) was of such seriousness as to constitute a hindrance or obstacle to his employment or reemployment should he become unemployed; and (3) equals a minimum of 50 weeks of compensation for injuries to the body as a whole or 15% for major extremities. *Dunn v. Treasurer of Missouri as Custodian of Second Injury Fund*, 272 S.W.3d 267, 272 (Mo.App. 2008)(Citations omitted).

The first inquiry to be made is whether the employer is liable for permanent total disability. Under Section 287.220.1 RSMo., the Second Injury Fund has no liability and the employer is responsible for full, permanent total disability benefits if the last injury "considered alone and of itself" results in permanent total disability. *Roller v. Treasurer of the State of Missouri*, 935 S.W.2d 739 (Mo. App. 1996) and *Maas v. Treasurer of the State of Missouri*, 964 S.W.2d 541 (Mo. App. 1998).

The test for permanent total disability is whether, given the employee's situation and condition, he or she is competent to compete in the open labor market. *Reiner v. Treasurer of the State of Missouri*, 837 S.W.2d 363, 367 (Mo. App. 1992). Total disability means the "inability to return to any reasonable or normal employment." *Brown v. Treasurer of the State of Missouri*, 795 S.W.2d 479, 483 (Mo. App. 1990).

Determining that Claimant is permanently and totally disabled is only part of the analysis; it is also necessary to determine which party, if any, is liable for the corresponding benefits. In any case involving the Second Injury Fund, the first determination is the degree of disability from the last injury. If a claimant's last injury in and of itself rendered the claimant permanently and totally disabled, then the Second Injury Fund has no liability and the employer is responsible for the entire amount. *Hughey v. Chrysler Corp.*, 34 S.W.3d 845, 847 Mo.App. 2000(citations omitted). When the situation is reversed, and the final disability is exclusively the result of the preexisting condition, it is equally true that the Second Injury Fund is not liable, since there is no tie-in with a compensable injury. 5 ARTHUR LARSON, LARSON'S WORKERS' COMPENSATION LAW Ch. 10, §59,32(g)(1992). However, when the evidence supports a

finding that it is a combination of previous disabilities with the last injury that results in permanent and total disability, the Second Injury Fund is liable. See *Boring v. Treasurer of Mo., Custodian of the Second Injury Fund*, 947 S.W.2d 483, 489-490 (Mo.App. 1997)(overruled on other grounds in *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo banc 2003).

Claimant's case in the matter at hand regarding a claim for permanent disability is based largely on two particular findings by the experts. One, the finding that he suffers psychiatric disability and two, that he lacks the ability to speak English fluently and is incapable of progressing in the study of English. I find that the argument and expert conclusions for each of these alleged conditions and circumstances are overstated and exaggerated.

The Administrative Law Judge as the trier of fact is the sole judge of the weight of the evidence and the credibility of witnesses in workers' compensation cases. *Bock v. Broadway Ford Truck Sales*, 55 S.W.3d 427,437 (Mo.App.E.D.2001). The ALJ is free to disbelieve the testimony of any witness, even if there is no contrary or impeaching evidence. *ABB Power T&B Company v. Kempker*, 236 S.W.3d 43,51-52 (Mo.App.W.D.2007). Thus, the ALJ is free to accept or reject any evidence, including medical evidence. *ABB Power*, 236 S.W.3d at 52. It is within the ALJ's discretion to determine the weight to be given to expert opinions, including those on causation. *Putnam-Heisler v. Columbia Foods*, 989 S.W.2d 257,261 (Mo.App.W.D.1999).

Although Claimant has been treated for other injuries and illnesses both in Europe and since arriving in America, Claimant was not diagnosed with a psychiatric condition until November, 2005. Evidence supporting the cause, nature and extent of the alleged PTSD and depressive disorder is not persuasive even if competent.

Claimant was treated by Dr. Rao and evaluated by Dr. Stillings with regard to PTSD and depression. I do not find persuasive the conclusions regarding causation for the condition. The allegation is that the illness arose from Claimant's time in Bosnia during the war. He was also being treated for cancer prior to coming to America. The causative connection between the origin and the diagnosis are too tenuous to be established as factual. Even though mental illness could go untreated for years, Claimant has been to many doctors both here and in Europe without a diagnosis prior to November 2005. I find this significant.

Dr. Rao prescribed medication for Claimant which Claimant found ineffective and stopped taking. He is not under a doctor's care for depression or PTSD. Other experts then relied on the diagnosis when drawing their ultimate conclusions of permanent total or permanent partial disability. Given all Claimant has experienced and been through there is no question he could suffer from a psychiatric condition and specifically the conditions diagnosed by Drs. Rao and Stillings. The nature and extent however of that diagnosis in this matter may make the difference of finding PTD or no PTD. I do not find the medical evidence is sufficient to show by competent and substantial evidence that Claimant has greater than 10% PPD from his depression or PTSD.

Second, the expert conclusions regarding Claimant's lack of competence in the English language and the affect his psychiatric condition has on his ability to progress in the fluency of that language are rejected by Claimant's demonstrated linguistic abilities. A thick accent is not

evidence of capacity or competence. Claimant not only spoke two languages when he arrived in the United States, he had already demonstrated an ability and desire to learn one foreign tongue (German) while in country only a short period. Even if his learning of German was only out of necessity while he was there, he nevertheless began the process of learning that language before leaving for America.

After arriving in the United States, Claimant progressed in English to the point of reading or attempting to read printed material in English. Furthermore he has demonstrated the ability to work several jobs where English was spoken, meet with doctors, submitted to depositions, and testified in a legal procedure under oath all without the aid or assistance of an interpreter. While Claimant has a strong accent, he is still understandable and clearly comprehends what is being spoken. Evidence and arguments by Claimant made to the contrary are not credible and given no weight.

Physical Injuries

Claimant has shown that he sustained a compensable injury on April 8, 2005 (05-031550). He also has a pre-existing injury to his left foot which has permanent partial disability. I find the extent of disability opined by evaluating experts too high and there make the following findings regarding permanency:

- I find Claimant's April 8, 2005 injury to his right hand and index finger result in 10% PPD referable to the hand with no aggravation of a psychiatric condition as alleged.
- I find the pre-existing injury to the left foot resulted in 30% PPD at the 155 level (ankle).

Psychiatric Condition

Claimant alleges PTSD and depression going back to his experiences in Bosnia including aggravation with later injuries. As discussed above, the finding of PTSD and depression came late in Claimant's medical history. This is significant because it affects the credibility of the cause and extent of the illness. The diagnosis also influenced other opinions provided by experts regarding Claimant's disability. Evidence in support of the conclusions should be clear and convincing in order to meet the standard of competent and substantial. It is not. To the extent Claimant is found to suffer from PTSD or depression, the evidence does not support a significant finding of PPD. I find any depressive disorder suffered by Claimant only justifies a finding of 10% PPD to the body as a whole (BAW). This amount does not reach the statutory threshold of 50 weeks required for SIF liability.

05-031550 (April 8, 2005)

The Fund is liable for PPD benefits if the pre-existing injuries and the last injury combine in such a way that the disability is greater than the simple sum of those injuries. In order to reach this conclusion however the primary injury, in this case the injury to the hand, must meet the statutory threshold of 15% disability for an upper extremity. Claimant's injury to his right hand

from the fracture and contusion result in a PPD of 10% and therefore does not meet the threshold for Fund liability.

CONCLUSION

The evidence presented does not demonstrate that Claimant's injury, the primary injury in this Matter (05-031550) resulted in an injury that meets the threshold for Second Injury Fund Liability. The Fund therefore has no liability for disability from this accident and no award of benefits is made.

Date: _____

John A. Tackes
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest

Naomi Pearson
Division of Workers' Compensation

¹ The Stipulation for Compromise Settlement in injury number 05-098958 included a dismissal with prejudice of injury number 05-119901 for date of injury July 1, 2005.

FINAL AWARD ALLOWING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge
by Supplemental Opinion)

Injury No.: 05-098958

Employee: Anto Anic

Employer: Bussen Realty & Terminal Co. (Settled)

Insurer: AIG Domestic Claims Inc. (Settled)

Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence, read the briefs, and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated July 9, 2010, as supplemented herein.

Introduction

The only issue at the hearing was the liability, if any, of the Second Injury Fund.

The administrative law judge made the following findings: (1) employee suffers from no more than 10% permanent partial disability of the body as a whole related to any depressive disorder; (2) employee suffers no permanent partial disability related to any difficulty with the English language; (3) employee sustained compensable injuries on April 8, 2005, which resulted in 10% permanent partial disability referable to the hand with no aggravation of a psychiatric condition; (4) employee sustained compensable injuries on October 3, 2005, which resulted in a 25% permanent partial disability of the upper extremity referable to the shoulder at the 232-week level; (5) employee suffered a preexisting left foot injury which resulted in 30% permanent partial disability at the 155-week level; and (6) the Second Injury Fund is liable for 20.9 weeks of permanent partial disability benefits because employee's right shoulder and left foot injuries combine to cause a greater disability than the sum of the injuries considered alone.

Employee filed an Application for Review alleging the administrative law judge erred in failing to find employee entitled to permanent partial¹ disability benefits in that the administrative law judge's decision is contrary to the opinions of Dr. Bruce Schlafly, the sole expert who testified at the hearing.

The Commission affirms the award of the administrative law judge as supplemented herein.

¹ Employee appears to have confused the award in this matter with that in Injury No. 05-031550; here, the administrative law judge did award 20.9 weeks of permanent partial disability benefits, but denied employee's claim for permanent total disability. We also note that, far from being the sole expert in the case, Dr. Schlafly did not testify at all in this matter.

Employee: Anto Anic

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Discussion*Credibility of the experts*

Although we agree with the result reached by the administrative law judge, the reasoning set forth in the award is somewhat unclear and raises the question whether the administrative law judge substituted his own opinions for those of the medical and vocational experts. We are also concerned that certain comments and findings in the award suggest the administrative law judge applied nonexistent legal principles, such as the following, which seems to conflate a standard of proof with a standard of judicial review:

Evidence in support of the conclusions should be clear and convincing in order to meet the standard of competent and substantial.

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This case does not turn on any such esoteric principle of law but rather on a question of whether the evidence presented is persuasive on the sole issue. The question, stated simply, is whether the opinions of employee's experts are credible on the issue of Second Injury Fund liability.

We have carefully weighed the opinions of each of the vocational and medical experts, and we write this supplemental opinion in order to make clear and explicit credibility findings.

Permanent total disability

The sole issue is the liability of the Second Injury Fund for either permanent partial or permanent total disability benefits as a result of the combination of the October 3, 2005, primary injury with any preexisting permanent partial disability. Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid from the fund in "all cases of permanent disability where there has been previous disability." For the Fund to be liable for permanent, total disability benefits, employee must establish that: (1) he suffered from a permanent partial disability as a result of the last compensable injury; and (2) that disability has combined with a prior permanent partial disability to result in total permanent disability. *ABB Power T & D Co. v. Kemper*, 236 S.W.3d 43, 50 (Mo. App. 2007).

Employee's difficulties with the English language are presented as a claimed preexisting permanent partial disability in this case. We are not convinced. Employee is a non-native English speaker who has been in the United States for more than a decade. He speaks English. Employee has an accent but was able to testify at the hearing in this matter without the aid of a translator. There is no evidence of any expert disability rating specific to employee's abilities with English.

Mr. Dolan, a vocational expert, believes that employee's English proficiency skills are "not very good" and that employee has a "serious communication problem." There is no indication that Mr. Dolan is a speech therapist or that he is otherwise qualified to diagnose any cognitive or physical condition related to employee's ability to speak English. We find Mr. Dolan's testimony lacking probative value as to whether employee's English skills amount to a preexisting disability.

Employee: Anto Anic

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Mr. England opined that employee does not appear to have the ability to maintain himself in a regular work setting. Mr. England found that employee is functionally illiterate in English and that this would keep him from jobs that involve reading, writing, and record keeping, but did not opine that employee's English difficulties amounted to a preexisting permanent partial disability, and like Mr. Dolan, there is no indication Mr. England would be qualified to render such an opinion.

Dr. Rosen, a clinical psychologist, opined that employee has "difficulty concentrating and focusing to learn English with any kind of mastery," but did not opine that employee's English skills on October 3, 2005, amounted to a preexisting disability, nor did he provide a rating for any such disability. Rather, Dr. Rosen believes employee can't improve his English skills due to his age, physical injuries, depression, and PTSD. Dr. Rosen goes on to register his opinion that employee's inability to improve his English has a deleterious effect on his employability, but Dr. Rosen is not a vocational expert. We consider Dr. Rosen wholly unpersuasive on the issue whether employee's English difficulties hinder his employability.

We are convinced that employee's difficulty with English does not rise to the level of a preexisting permanent partial disability for purposes of Second Injury Fund liability. This is because there is no credible expert medical evidence to show that employee's English deficiencies amounted to an actual, measurable preexisting permanent partial disability on October 3, 2005, the date of the primary injury. We acknowledge that Dr. Rosen opined that employee's psychiatric issues prevent him from improving his English, but we are not convinced. Employee moved to the United States and learned enough English to secure gainful employment despite his previous experiences in Bosnia. Employee demonstrated his ability to speak English when he testified at the hearing before the administrative law judge without the aid of an interpreter. We conclude that employee's difficulty, if any, with English is not due to any inability to learn or improve his skills, but rather to a lack of education. Accordingly, employee has failed to prove that he suffered preexisting permanent partial disability related to his English skills. See *Tiller v. 166 Auto Auction*, 941 S.W.2d 863, 866 (Mo. App. 1997) (holding that "[w]here illiteracy is not due to inability to learn, but to lack of education, it is not a permanent partial disability for Second Injury Fund purposes.")

In sum, while employee's English language skills are certainly relevant in the context of the isolated question whether employee is permanently and totally disabled, we conclude they are not a "preexisting permanent partial disability" for purposes of § 287.220.1, and that they, therefore, cannot combine with the primary injury in such a way to establish employee's entitlement to permanent total disability benefits from the Second Injury Fund.

Because we otherwise agree that employee is not permanently and totally disabled due to a combination of the primary injury with any preexisting condition of ill, we affirm the remainder of the award of the administrative law judge without further supplementation.

Decision

We supplement the award of the administrative law judge with the foregoing findings and comments. In all other respects, we affirm the award.

Employee: Anto Anic

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The award and decision of Administrative Law Judge John A. Tackes, issued July 9, 2010, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 31st day of May 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

FINAL AWARD

5/31/2011 8:02 AM

Employee:	Anto Anic	Injury No.:	05-098958
Dependents:	N/A	Before the	
Employer:	Bussen Realty & Terminal Co. (Settled)	Division of Workers'	
Additional Party:	Second Injury Fund	Compensation	
Insurer:	AIG Domestic Claims Inc. (Settled)	Department of Labor and Industrial	
Hearing Date:	April 5, 2010	Relations of Missouri	
		Jefferson City, Missouri	
		Checked by:	JAT

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: October 3, 2005
5. State location where accident occurred or occupational disease was contracted: St. Louis City
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Claimant injured his right shoulder while lifting the hood of a forklift.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Right Shoulder
14. Nature and extent of any permanent disability: 25% PPD
15. Compensation paid to-date for temporary disability: \$0.00
16. Value necessary medical aid paid to date by employer/insurer? \$0.00

Employee: Anto Anic

Injury No.: 05-098958

17. Value necessary medical aid not furnished by employer/insurer? \$0.00

18. Employee's average weekly wages: N/A

19. Weekly compensation rate: \$433.48/\$354.05

20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable: None

22. Second Injury Fund liability:

20.9 weeks of permanent partial disability from Second Injury Fund \$7,399.64

TOTAL: \$7,399.64

23. Future requirements awarded: N/A

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Ray B. Marglous

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Anto Anic	Injury No: 05-098958
Dependents:	N/A	Before the
Employer:	Bussen Realty & Terminal Co. (Settled)	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
Insurer:	AIG Domestic Claims Inc. (Settled)	Department of Labor and Industrial
Hearing Date:	April 5, 2010	Relations of Missouri
		Jefferson City, Missouri
		Checked by: JAT

INTRODUCTION

A hearing in this Matter was held on April 5, 2010, in St. Louis, Missouri at the Division of Workers' Compensation before Administrative Law Judge John A. Tackes. Anto Anic, Claimant, appeared in person and testified. Robert Merlin represented Claimant. Kareitha Osborne represented the Second Injury Fund. J. Stephen Dolan, Certified Rehabilitation Counselor was present and testified on behalf of Claimant.

Prior to the hearing claims for two injury numbers (05-031550 & 05-098958) were settled against the Employer/Insurer by compromise lump sum settlement. The Second Injury Fund was not a party to either of those settlement agreements. The employment relationship, insurance coverage under Workers' Compensation, notice, and timeliness of the claim are not at issue in this award.

All objections not expressly ruled upon in this award are overruled to the extent they conflict with this award.

STIPULATIONS

1. The date of injury for injury number 05-031550 is April 8, 2005.
2. The date of injury for injury number 05-098958 is October 3, 2005.
3. Temporary Total Disability (TTD)/Permanent Total Disability (PTD) and Permanent Partial Disability (PPD) compensation rates for each both injury numbers is \$433.48/\$354.05.

ISSUES

The sole issue is the liability of the Second Injury Fund for benefits.

FINDINGS OF FACT

Based on the competent and substantial evidence and my observations of Claimant at trial, I find:

1. Claimant is a Yugoslavian born Croat. He was born December 7, 1953 in what is now Bosnia. He attended a vocational high school to become a machine operator and machinist. As an ethnic minority, Claimant experienced discrimination and limitation of career and educational opportunity because of his religious and political views. While in Bosnia he was diagnosed with throat cancer. Claimant had some cancer treatment in Bosnia but his treatment was interrupted when war broke out.
2. In Bosnia, Claimant was employed as a miner for ten years where he received additional on the job training and drove diesel trucks. Claimant served 15 months in the army in a non combat role where he received additional machine and weapons training. His underground work at the mines affected his breathing and he was moved to a position above ground. Claimant continues to complain of breathing trouble when working with chemicals. Claimant left Bosnia in 1994 after the war and moved to Germany. In Germany he completed his cancer treatment before coming to the United States.
3. Claimant is literate in both Bosnian and Croatian. He is able to speak some German but spoke no English before he came to the United States. Since arriving in the United States, Claimant has learned a considerable amount of English. He testified at hearing without the assistance of a translator. He was evaluated by physicians and vocational experts without the use of translators. He has held several jobs in America.
4. Claimant was employed at Bussen Terminal (Bussen) from August 11, 1999 to November 2005 as a forklift operator. This position required lifting, bending, squatting, climbing and reaching. He also maintained and cleaned machinery. Prior to this he held a sedentary position for about two months inspecting vending machines. Prior to this he worked at a church as a maintenance man for a year where he cleaned, painted, and emptied trash.
5. Claimant had no injuries at either of his first two jobs after arriving in St. Louis. The work he performed as a maintenance man was physical in nature but he was able to complete all duties as assigned. The more physical position was with Bussen where he loaded and unloaded barges on the Mississippi River. This work involved lifting, walking, standing, and some climbing.
6. On February 18, 2000, Claimant injured his left foot while on a barge cutting bundles of material. A heavy piece of equipment fell on his foot causing laceration and fractures of all five toes. He had several surgeries and physical therapy. He returned to work with restrictions on climbing, standing, pushing and pulling. In November, 2000 Dr. Sudekum released Claimant to return to full duty. Dr. Sudekum opined 8% PPD of the left foot at the ankle.

7. Claimant continued to complain of pain in his left foot with weight bearing and had a residual limp. He was seen by Dr. Place in January 2001. Dr. J.H. Morrow, saw Claimant in July, 2002 because of continued complaints and loss of range of motion. He rated 60% PPD of the left lower extremity at the ankle. Claimant continues to complain of pain in his left foot and has a limp. The injury to his foot made it more difficult for him to bend, lift, and stoop.
8. On April 8, 2005, Claimant injured his right hand when he struck it with a hammer working for Bussen. He was treated for a contusion and abrasions to his fingers. An x-ray showed a healing stress fracture of the right second finger. He had physical therapy in May, 2005. On May 31, 2005, Dr. Brown released him to return to work without restrictions. He received medical treatment for a fracture and the tip of his index finger remains crooked and unable to straighten completely. He complains of pain in the finger and difficulty grabbing and holding items with that hand.
9. On October 3, 2005, Claimant injured his right shoulder at Bussen while lifting the hood of a forklift. He felt a pop in his shoulder and immediate pain. Dr. Sun diagnosed Claimant with a severe right shoulder pain/strain. This was treated with physical therapy on October 10, 2005. Therapy lasted until October 26, 2005. A therapist noted that significant limitation remained.
10. On November 8, 2005, an MRI revealed tendonitis but no tear of the rotator cuff. Claimant received a steroid injection in November 2005 by Dr. Richard Howard. Dr. Howard restricted Claimant from lifting more than five pounds with no overhead activities. In January, 2006, Dr. Brown determined the pain had resolved and Claimant was released to return to work full duty.
11. On June 16, 2006, Dr. Ken Yamaguchi, Washington University, performed right arthroscopic subacromial decompression and arthroscopic bursectomy for right shoulder rotator cuff repair tendonitis and painful arc. Claimant still complains of pain and tenderness in his right shoulder
12. Claimant was seen by Dr. Shankar Rao, a psychiatrist with Psych Care Consultants, beginning in November, 2005. He was examined and treated from November 11, 2005 to January 26, 2006. Dr. Rao diagnosed Claimant with PTSD and depression and prescribed medication. According to his psychosocial evaluation of November 11, 2005, the onset or duration of the illness was three years prior. Claimant is no longer under the care of Dr. Rao.
13. John Stephen Dolan, a vocational rehabilitation counselor, gave expert testimony at hearing with regard to Claimant's employability in the open labor market. Mr. Dolan evaluated Claimant in person on August 6, 2009, at the Claimant's request to determine whether Claimant's disability interferes with his employment or re-employment and to assess whether Claimant could return to work with the assistance of education, training, and job placement.

14. Mr. Dolan met with Claimant once in person and spoke with him a second time by telephone. His evaluation was based on a review of medical records, expert reports, and vocational exams given during the examination. Claimant was tested for his math and reading skills. Claimant tested higher for math skills than reading. Mr. Dolan did not consider Claimant a candidate for retraining. Mr. Dolan concluded Claimant was unemployable due to education, physical limitations, psychiatric condition, and English proficiency.
15. Mr. Dolan's opinion that Claimant is not employable is based on a review of Claimant's work history, training, and education from a review of available records and his examination of Claimant. He was aware that Claimant spoke no English when he arrived in America but after twelve years was able to meet with him and communicate in English without the assistance of a translator. Mr. Dolan does not anticipate Claimant's language skills improving which played a role in his ultimate opinion regarding employability. In his testimony at hearing, Mr. Dolan opined that were it not for the language barrier, Claimant would be able to compete for at least some entry level unskilled positions.
16. Claimant was administered a Global Assessment of Functioning (GAF) which is used to determine employability and educational ability. He scored just below the level of employability on the test. No employment records from Bussen were reviewed by Mr. Dolan. The second time he met with Claimant was by telephone on March 22, 2009. The conversation was completed without an interpreter.
17. Dr. Wayne Stillings, Kare & Therapy, Inc., saw Claimant on November 16, 2006, for a psychiatric IME. Dr. Stillings diagnosed PTSD related to Claimant's experience in the Bosnian war, mood disorder due to the injury to his right shoulder and index finger, chronic pain, chronic emotional problems from the Bosnian war, and found Claimant achieved psychiatric MMI effective November 16, 2006.
18. Dr. Stillings opined psychiatric PPD as 25% BAW for mood disorder from April, July, and October 2005 injuries and 25% PPD BAW for pre-existing chronic PTSD. The PPD values assigned by Dr. Stillings are not credible and given no weight in this award.
19. Dr. Shawn Berkin performed an IME on December 11, 2006. Based on Claimant's complaints of pain in his right index finger and right shoulder, limited range of motion in his right arm, and weakness in his right arm and hand, as well as the rotator cuff strain with impingement syndrome, he rated Claimant's PPD as follows:
 - 12.5% right upper extremity at the wrist.
 - 10% right upper extremity at the shoulder (July 1, 2005)¹
 - 35% right upper extremity at the shoulder (October 3, 2005)
 - 40% left lower extremity at the ankle (Pre-existing).
20. James M. England, Jr., Rehabilitation Counselor saw Claimant twice at Claimant's request for the purpose of an evaluation of Claimant's employability in the labor market. He saw him February 22, 2007 and again in December, 2007. Mr. England opines that Claimant is not capable of competing for and sustaining regular employment on the open

labor market because of a combination of the psychological problems and the physical issues. He found Claimant's physical limitations, English proficiency, and depression combined prevented employment.

21. Dean L. Rosen, Psy.D., Clinical Psychologist examined Claimant on August 8, 2008. He reviewed Claimant's medical records, examined and interviewed Claimant for a report on Claimant's employability. Included in the records reviewed by Dr. Rosen were the diagnoses of depression/PTSD by Dr. Rao as well as Mr. England's vocational assessment. In tests administered by Dr. Rosen, Claimant scored low on vocabulary and abstract problem solving. He opined that Claimant's age, psychiatric diagnoses, physical limitations and lack of fluency in English prevented sustained employment, and rated him 25% PPD referable to the man.
22. Claimant complained of problems he experienced with coworkers at different jobs. At one position he was working with Bosnians where Claimant was the only Croat. Claimant explained that in Bosnia, the Bosnians and Croats were enemies which made working with them difficult. At another position he found American workers' curiosity about his past and his ethnicity annoying. Claimant continues to complain of pain in his left foot, right hand, and right arm. If he sits or stands for long periods of time his left foot becomes numb.

RULINGS OF LAW

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented and the applicable law, I find the following:

A claimant in a worker's compensation proceeding has the burden of proving all elements of his claim to a reasonable probability. *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 911 (Mo.App. 2008). In order for a claimant to recover against the Second Injury Fund for PTD or PPD, he must prove that a pre-existing disability combined with a disability from a subsequent injury in one of two ways: (1) the two disabilities combined result in a greater overall disability than that which would have resulted from the new injury alone and of itself; or (2) the pre-existing disability combined with the disability from the subsequent injury to create permanent total disability. *Reese v. Gary & Roger Link, Inc.*, 5 S.W.3d 522, 526 (Mo.App. 1999), citing *Searcy v. McDonnell Douglas Aircraft Co.*, 894 S.W.2d 173, 177-178 (Mo.App. 1995); *Uhlir v. Farmer*, 94 S.W.3d 441, 444 (Mo.App. 2003).

Claimant must also prove that he had a pre-existing permanent partial disability, whether from a compensable injury or otherwise, that: (1) existed at the time the last injury was sustained; (2) was of such seriousness as to constitute a hindrance or obstacle to his employment or reemployment should he become unemployed; and (3) equals a minimum of 50 weeks of compensation for injuries to the body as a whole or 15% for major extremities. *Dunn v. Treasurer of Missouri as Custodian of Second Injury Fund*, 272 S.W.3d 267, 272 (Mo.App. 2008)(Citations omitted).

The first inquiry to be made is whether the employer is liable for permanent total disability. Under Section 287.220.1 RSMo., the Second Injury Fund has no liability and the employer is responsible for full, permanent total disability benefits if the last injury “considered alone and of itself” results in permanent total disability. *Roller v. Treasurer of the State of Missouri*, 935 S.W.2d 739 (Mo. App. 1996) and *Maas v. Treasurer of the State of Missouri*, 964 S.W.2d 541 (Mo. App. 1998).

The test for permanent total disability is whether, given the employee’s situation and condition, he or she is competent to compete in the open labor market. *Reiner v. Treasurer of the State of Missouri*, 837 S.W.2d 363, 367 (Mo. App. 1992). Total disability means the “inability to return to any reasonable or normal employment.” *Brown v. Treasurer of the State of Missouri*, 795 S.W.2d 479, 483 (Mo. App. 1990).

Determining that Claimant is permanently and totally disabled is only part of the analysis; it is also necessary to determine which party, if any, is liable for the corresponding benefits. In any case involving the Second Injury Fund, the first determination is the degree of disability from the last injury. If a claimant’s last injury in and of itself rendered the claimant permanently and totally disabled, then the Second Injury Fund has no liability and the employer is responsible for the entire amount. *Hughey v. Chrysler Corp.*, 34 S.W.3d 845, 847 Mo.App. 2000(citations omitted). When the situation is reversed, and the final disability is exclusively the result of the preexisting condition, it is equally true that the Second Injury Fund is not liable, since there is no tie-in with a compensable injury. 5 ARTHUR LARSON, LARSON’S WORKERS’ COMPENSATION LAW Ch. 10, §59.32(g)(1992). However, when the evidence supports a finding that it is a combination of previous disabilities with the last injury that results in permanent and total disability, the Second Injury Fund is liable. See *Boring v. Treasurer of Mo., Custodian of the Second Injury Fund*, 947 S.W.2d 483, 489-490 (Mo.App. 1997)(overruled on other grounds in *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo banc 2003).

Claimant’s case in the matter at hand regarding a claim for permanent disability is based largely on two particular findings by the experts. One, the finding that he suffers psychiatric disability and two, that he lacks the ability to speak English fluently and is incapable of progressing in the study of English. I find that the argument and expert conclusions for each of these alleged conditions and circumstances are overstated and exaggerated.

The Administrative Law Judge as the trier of fact is the sole judge of the weight of the evidence and the credibility of witnesses in workers’ compensation cases. *Bock v. Broadway Ford Truck Sales*, 55 S.W.3d 427,437 (Mo.App.E.D.2001). The ALJ is free to disbelieve the testimony of any witness, even if there is no contrary or impeaching evidence. *ABB Power T&B Company v. Kempker*, 236 S.W.3d 43,51-52 (Mo.App.W.D.2007). Thus, the ALJ is free to accept or reject any evidence, including medical evidence. *ABB Power*, 236 S.W.3d at 52. It is within the ALJ’s discretion to determine the weight to be given to expert opinions, including those on causation. *Putnam-Heisler v. Columbia Foods*, 989 S.W.2d 257,261 (Mo.App.W.D.1999).

Although Claimant has been treated for other injuries and illnesses both in Europe and since arriving in America, Claimant was not diagnosed with a psychiatric condition until

November, 2005. Evidence supporting the cause, nature and extent of the alleged PTSD and depressive disorder is not persuasive even if competent.

Claimant was treated by Dr. Rao and evaluated by Dr. Stillings with regard to PTSD and depression. I do not find persuasive the conclusions regarding causation for the condition. The allegation is that the illness arose from Claimant's time in Bosnia during the war. He was also being treated for cancer prior to coming to America. The causative connection between the origin and the diagnosis are too tenuous to be established as factual. Even though mental illness could go untreated for years, Claimant has been to many doctors both here and in Europe without a diagnosis prior to November 2005. I find this significant.

Dr. Rao prescribed medication for Claimant which Claimant found ineffective and stopped taking. He is not under a doctor's care for depression or PTSD. Other experts then relied on the diagnosis when drawing their ultimate conclusions of permanent total or permanent partial disability. Given all Claimant has experienced and been through there is no question he could suffer from a psychiatric condition and specifically the conditions diagnosed by Drs. Rao and Stillings. The nature and extent however of that diagnosis in this matter may make the difference of finding PTD or no PTD. I do not find the medical evidence is sufficient to show by competent and substantial evidence that Claimant has greater than 10% PPD from his depression or PTSD.

Second, the expert conclusions regarding Claimant's lack of competence in the English language and the affect his psychiatric condition has on his ability to progress in the fluency of that language are rejected by Claimant's demonstrated linguistic abilities. A thick accent is not evidence of capacity or competence. Claimant not only spoke two languages when he arrived in the United States, he had already demonstrated an ability and desire to learn one foreign tongue (German) while in country only a short period. Even if his learning of German was only out of necessity while he was there, he nevertheless began the process of learning that language before leaving for America.

After arriving in the United States, Claimant progressed in English to the point of reading or attempting to read printed material in English. Furthermore he has demonstrated the ability to work several jobs where English was spoken, meet with doctors, submitted to depositions, and testified in a legal procedure under oath all without the aid or assistance of an interpreter. While Claimant has a strong accent, he is still understandable and clearly comprehends what is being spoken. Evidence and arguments by Claimant made to the contrary are not credible and given no weight.

Physical Injuries

Claimant has shown that he sustained compensable injuries on April 8, 2005 (05-031550) and October 3, 2005 (05-098958). He also has a pre-existing injury to his left foot which has permanent partial disability. I find the extent of disability opined by evaluating experts too high and there make the following findings regarding permanency:

- I find Claimant's injury to his right shoulder on October 3, 2005 resulted in 25% PPD of the upper extremity referable to the 232 level of the shoulder.

- I find Claimant's April 8, 2005 injury to his right hand and index finger result in 10% PPD referable to the hand with no aggravation of a psychiatric condition as alleged.
- I find the pre-existing injury to the left foot resulted in 30% PPD at the 155 level (ankle).

Psychiatric Condition

Claimant alleges PTSD and depression going back to his experiences in Bosnia including aggravation with later injuries. As discussed above, the finding of PTSD and depression came late in Claimant's medical history. This is significant because it affects the credibility of the cause and extent of the illness. The diagnosis also influenced other opinions provided by experts regarding Claimant's disability. Evidence in support of the conclusions should be clear and convincing in order to meet the standard of competent and substantial. It is not. To the extent Claimant is found to suffer from PTSD or depression, the evidence does not support a significant finding of PPD. I find any depressive disorder suffered by Claimant only justifies a finding of 10% PPD to the body as a whole (BAW). This amount does not reach the statutory threshold of 50 weeks required for SIF liability.

05-031550 (April 8, 2005)

The Fund is liable for PPD benefits if the pre-existing injuries and the last injury combine in such a way that the disability is greater than the simple sum of those injuries. In order to reach this conclusion however the primary injury, in this case the injury to the hand, must meet the statutory threshold of 15% disability for an upper extremity. Claimant's injury to his right hand from the fracture and contusion result in a PPD of 10% and therefore does not meet the threshold for Fund liability.

05-098958 (October 3, 2005)

In order for Claimant to prevail on his PTD claim against the Second Injury Fund (SIF), he must prove that the last injury of October 3, 2005 (right shoulder) combined with the pre-existing disabilities to cause permanent total disability. I do not find Claimant has met his burden to show that he is permanently and totally disabled due to a combination of his primary injury and pre-existing injuries and condition. The last injury alone did not cause Claimant to be permanently and totally disabled. Taken alone, his injuries to the left foot, right hand, and right shoulder do not combine in such a way to cause Claimant to be unemployable.

Furthermore I do not find Claimant's English ability and competence when combined with the injuries cause him to be unemployable in the open labor market. He speaks English. He has demonstrated an ability to work more than one job and to meet the job requirements including communication. Any conflicts Claimant had with others at work are found to be related to other social factors and not because of any psychiatric condition or communication skills.

Finally, the allegation that the diagnosed conditions of PTSD and depression combined with physical injuries and lack of fluency in English is too weak to support a finding of PTD.

The Fund is liable for PPD benefits if the pre-existing injuries and the last injury combine in such a way that the disability is greater than the simple sum of those injuries. Claimant's primary injury to his right shoulder results in a 25% PPD which meets the threshold for Fund liability. His compensable pre-existing injury which also meets the threshold is the injury to his left foot from 2000 which is 30% permanently partially disabled. These injuries combine to cause a greater disability than the sum of those injuries alone. In consideration of the nature and extent of the injuries, I find a load factor of 20% is appropriate. Injuries which do not reach the threshold for Fund liability, i.e. 50 weeks for the body as a whole or 15% of a major extremity, are not considered in the calculation. The disability percentages assigned by experts or included as part of prior settlements are instructive but not binding.

Load Factor calculation:

Primary injury to right shoulder of 25% PPD measured at the 232 level yields 58 weeks. Pre-existing injury to the left foot of 30% PPD measured at the 155 level yields 46.5 weeks. Adding a 20% load factor to 104.5 weeks is 20.9 additional weeks for which the Fund is liable. 20.9 weeks times the rate of \$354.05 is **\$7,399.64.**

CONCLUSION

The evidence presented does not demonstrate that Claimant is permanently and totally disabled as a result of the combination of the last injury combined with the pre-existing injuries and conditions. The Second Injury Fund is however liable for PPD for the greater amount of disability as a result of the combination of last injury and pre-existing condition greater than is greater than the sum of those injuries alone. The amount of liability for the Fund is **\$7,399.64.**

Date: _____

John A. Tackes
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest

Naomi Pearson
Division of Workers' Compensation

¹ The Stipulation for Compromise Settlement in injury number 05-098958 included a dismissal with prejudice of injury number 05-119901 for date of injury July 1, 2005.